Interfood Sdn Bhd v Arthur Andersen & Co & Anor

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO MT3-22-137 OF 1999
LOW HOP BING J
23 SEPTEMBER 1999

Civil Procedure *— Discovery — Order for oral evidence — Plaintiff relying on* Norwich Pharmacal *principle — Application by way of ex parte summons-in-chamber — Whether plaintiff attempting to compel witnesses to give oral evidence for purposes of committal proceedings — Failure to comply with O 39 of Rules of the High Court 1980 — Whether order should be set aside*

The plaintiff had, pursuant to an Anton Pillar order, obtained an ex parte order allowing oral evidence to be taken from certain individuals ('the order for oral evidence') in respect of the alleged wrongdoings of the first defendant in the altering, tampering or doctoring of certain audit working papers. The first defendant and two other deponents ('the deponents') sought to set aside the order.

Counsel for the deponents argued, inter alia, that: (i) the plaintiff was actually attempting to compel witnesses to give oral evidence for the purposes of committal proceedings; (ii) the plaintiff had failed to comply with O 39 of the Rules of the High Court 1980 when applying for the order for oral evidence; and (iii) the plaintiff's application to obtain the order for oral evidence should not have been made ex parte but should instead invoke O 39 r 1. Plaintiff's counsel submitted that the plaintiff was not relying on O 39, but on the *Norwich Pharmacal* principle.

Held, dismissing the application:

(1) The evidence sought to be adduced by the plaintiff pursuant to the order for oral evidence was not for the purposes of the committal proceedings but rather with a view to discrediting or attacking the content of the audit working files, by way of the process of discovery, in order to identify the partner or partners of the first defendant for any alleged act of tampering. The oral evidence cannot add to any grounds to the committal proceedings because these grounds must first be contained in the statement under O 52 r 2(2) (see p 29F–G).

(2) The plaintiff's summons-in-chambers is consistent with the application of the *Norwich Pharmacal* principle. The approved procedure is by way of summons-in-chamber made ex parte without notice to the appellant. The plaintiff was thus correct in adopting the procedure herein. The first defendant is of course entitled to cross-examine the witnesses (see p 30E–G); *Lee Lim Huat v Yusuf Khan bin Ghows & Anor* [1997] 2 MLJ 472 followed.

(3) The plaintiff was entitled to the process of discovery in order to identify which partner of the first defendant was implicated in the

alleged doctoring of the working files and papers. These are the questions that may only be answered by adducing evidence pursuant to the order for oral evidence (see p 31C–D).

(4) Since O 39 r 1 has not been relied upon by the plaintiff who has instead correctly followed and complied with the procedure as approved by the Court of Appeal in *Lee Lim Huat*'s case, O 39 has no application in this case (see p 31F). All the submissions advanced for the deponents were completely irrelevant to the order for oral evidence obtained pursuant to the *Norwich Pharmacal* principle (see p 31G–H).

[**Bahasa Malaysia summary**

Plaintif berikutan suatu perintah Anton Pillar telah memperolehi suatu perintah ex parte membenarkan keterangan lisan diambil daripada beberapa individu tertentu berkenaan dengan pengataan kesalahan yang dilakukan oleh defendan pertama di dalam meminda, mengubah atau memalsukan beberapa kertas-kertas kerja audit. Defendan pertama dan dua deponen yang lain ('deponen-deponen tersebut') cuba untuk mengketepikan perintah tersebut.

Peguam untuk deponen-deponen berhujah, antara lain, bahawa (i) plaintif tersebut sebenarnya cuba untuk mendorong saksi-saksi untuk memberikan keterangan lisan bagi tujuan prosiding pengkomitan; (ii) plaintif telah gagal untuk mematuhi A 39 Kaedah-Kaedah Mahkamah Tinggi 1980 semasa memohon untuk perintah keterangan lisan; dan (iii) permohonan plaintiff untuk memperolehi perintah tersebut untuk keterangan lisan tidak patut dibuat secara ex parte tetapi sebaliknya patut membangkitkan A 39 k 1. Peguam plaintif berhujah bahawa plaintif tidak bergantung kepada A 39, tetapi prinsip *Norwich Pharmacal.*

Diputuskan, membatalkan permohonan tersebut:

(1) Keterangan yang ingin dikemukakan oleh plaintif berikutan suatu perintah keterangan lisan bukanlah bagi tujuan prosiding pengkomitan tetapi sebaliknya bagi tujuan untuk memburuk-burukkan atau menyerang kandungan fail kerja audit tersebut, dengan cara proses penzahiran, untuk mengenal pasti rakan kongsi atau rakan kongsi-rakan kongsi defendan pertama untuk sebarang tindakan mengubah. Keterangan lisan tersebut tidak boleh menambah kepada sebarang alasan kepada prosiding pengkomitan oleh kerana alasan-alasan ini mestilah terkandung di dalam kenyataan di bawah A 52 k 2(2) (lihat ms 29F–G).

(2) Saman-dalam-kamar plaintif adalah konsisten dengan pemakaian prinsip *Norwich Pharmacal.* Prosedur yang dibenarkan adalah melalui saman-dalam-kamar yang dibuat secara ex parte tanpa notis kepada perayu. Oleh itu, plaintif adalah betul di dalam menerimapakai prosedur di dalamnya. Defendan pertama

adalah berhak untuk memeriksa balas saksi-saksi tersebut (lihat ms 30E–G); *Lee Lim Huat v Yusuf Khan bin Ghows & Anor* [1997] 2 MLJ 472 diikut.

(3) Plantif berhak kepada proses penzahiran untuk mengenal pasti siapa rakan kongsi defendan pertama telah terbabit di dalam pengataan memalsukan fail-fail dan kertas-kertas kerja. Ini adalah persoalan-persoalan yang mungkin boleh dijawab dengan mengemukakan keterangan menurut perintah keterangan lisan tersebut (lihat ms 31C–D).

(4) Oleh kerana plaintif tidak bergantung kepada A 39 k 1 tetapi sebaliknya telah mengikut dengan betul dan mematuhi prosedur seperti yang diluluskan oleh Mahkamah Rayuan di dalam kes *Lee Lim Huat*, A 39 tidak mempunyai pemakaian di dalam kes ini (lihat ms 31F). Semua hujahan yang dikemukakan oleh deponen adalah tidak berkaitan langsung kepada perintah keterangan lisan tersebut yang diperolehi menurut prinsip *Norwich Pharmacal* (lihat ms 31G–H).]

Notes

For cases on discovery generally, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1569–1605.

Cases referred to

Cheow Chew Koon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman [1995] 1 MLJ 457 (refd)

Lee Lim Huat v Yusuf Khan bin Ghows & Anor [1997] 2 MLJ 472 (folld)

Norwich Parmacal Co & Ors v Customs and Excise Commissioners [1974] AC 133 (refd)

Sunkyong International Inc v Malaysia Rubber Development Corporation Bhd [1992] 2 MLJ 146 (refd)

Legislation referred to

Rules of the High Court 1980 O 29 r 1(2), (2A), 39, r 1, O 52 rr 2(2), (3)

Gideon Tan (*Mohd Zaini* with him) (*Gideon Tan Razali Zaini*) for the plaintiff.

Cecil Abraham (*Gurmeet Kaur* with him) (*Shearn Delamore & Co*) for the first defendant.

Effendi Othman (*Zaid Ibrahim & Co*) for Pang Seng John & Pang Yan Boon.

Zaki Azmi (*Robert Lau* with him) (*Lee & Tan Associates*) for the other defendants.

Cur Adv Vult

Low Hop Bing J:

APPLICATION

This application in encl 62 by the first defendant and two other deponents Pang Shen John and Pang Yan Boon ('the first defendant and two others') seeks to set aside the ex parte order which I made on 8 June 1999 in encl 42, allowing oral evidence to be taken from three individuals, viz Pang Shen John, Pang Yan Boon and Lee Chong Hui ('the order for oral evidence') in respect of the alleged wrongdoings of the first defendant in altering, tampering or doctoring the audit working papers obtained by the plaintiff pursuant to an Anton Pillar order dated 9 March 1999 ('the Anton Pillar order').

SUBMISSIONS AND DECISION

Respective learned counsel for the first defendant and two others raise substantially similar issues in their respective submissions. Hence, it is necessary to consider these issues together for the purpose of arriving at my decision. The issues are particularized under the following heads:

Plaintiff's attempt to compel witnesses for purposes of committal proceedings

It was submitted for the first defendant and two others that the plaintiff is attempting to compel witnesses to give oral evidence for the purposes of committal proceedings.

The contention for the plaintiff is that the oral evidence when adduced would not be used in the committal proceedings which would be dealt with independently.

From the submissions, it is my view that there is not the slightest doubt that the evidence sought to be adduced by the plaintiff pursuant to the order for oral evidence is not for the purposes of the committal proceedings but rather with a view to discrediting or attacking the content of the audit working files, by way of the process of discovery in order to identify the partner or partners of the first defendant for any alleged act of tampering. The oral evidence cannot add to any grounds to the committal proceedings because these grounds must first be contained in the statement under O 52 r 2(2) of the Rules of the High Court 1980 ('RHC'). Further, O 52 r 5(3) provides that no grounds shall be relied upon except the grounds set out in the statement under O 52 r 2(2), unless the court hearing an application for an order of committal grants leave. That is a separate proceeding.

The order for oral evidence was granted by me on principle established in *Norwich Parmacal Co & Ors v Customs and Excise Commissioners* [1974] AC 133 (HL) ('the *Norwich Pharmacal* principle'). This is the process of discovery against third parties and the procedure was approved by the Court of Appeal in *Lee Lim Huat v Yusuf Khan bin Ghows & Anor* [1997] 2 MLJ 472.

Briefly, *Lee Lim Huat*'s case involved a dispute in a law firm wherein the appellant Mr Lee Lim Huat parted company with the respondents. The

respondents later complained that the appellant continued to interfere with the affairs of the new law firm. The respondents applied for and obtained an interlocutory injunction restraining the appellant from acting in a manner detrimental to the partnership. Subsequently, a client of the partnership who was once attended by the appellant, wrote to the respondents stating that 'after due consultation with the person in charge' the amount owing to the respondents have been reduced to only RM58,000. The respondents obtained an order for oral examination to be taken from the client, the third party, and the oral evidence was conducted in the absence of the appellant.

In *Lee Lim Huat*'s case, the appellant complained about the way the respondents obtained evidence from the third party. The appellant argued that the procedure adopted by the respondents were non existent and that notice of the summons for oral evidence should have been given to the appellant. The Court of Appeal rejected the appellant's arguments, adopted and approved the *Norwich Pharmacal* principle, which has been stated by Lord Reid at p 175 as follows:

> ... if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoings, he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense, the person seeking the information ought to reimburse him. But justice requires that he should cooperate in righting the wrong if he unwittingly facilitated its preparation.

The plaintiff's summons in chambers in encl 28 is consistent with the application of the *Norwich Pharmacal* principle.

The procedure approved by the Court of Appeal in *Lee Lim Huat*'s case, when applying the *Norwich Pharmacal* principle is, quite clearly, by summons-in-chamber and made ex parte without notice to the appellant in that case.

From the decision of the Court of Appeal in *Lee Lim Huat*'s case, I hold that the plaintiff is correct in adopting the procedure herein. The first defendant is of course entitled to cross-examine the witnesses.

Plaintiff's failure to comply with O 39

Another issue raised by the first defendant and two others is that the plaintiff has failed to comply with O 39 of the Rules of the High Court 1980 when the plaintiff applied for the order for oral evidence.

The plaintiff's counsel submitted that the plaintiff was not relying on O 39, but on the *Norwich Pharmacal* principle as alluded to above.

For a better perception of O 39, it is necessary for me to refer to O 39 r 1 which is reproduced below:

> (1) The Court may, in any course or matter where it appears necessary for the purposes of justice, make an order in Form 73 for the

examination on oath before a Judge or the Registrar or some other person, at any place, of any person.

(2) An order under para (1) may be made on such terms (including, in particular, terms as to giving of discovery before the examination takes place) as the Court thinks fit.

Since the plaintiff is not relying on O 39 r 1, the issue for determination is whether in obtaining the order for oral evidence, the plaintiff has complied with the procedure as enunciated in *Norwich Pharmacal* principle which has been approved by the Court of Appeal in *Lee Lim Huat*'s case.

The plaintiff's statement of claim is founded upon a cause of action arising out of both contract and professional negligence in preparing the audit of the plaintiff. At the heart of this question is the first defendant's audit working files which would show the standard of work provided by the first defendant during the audit of the plaintiff. If these audit working files have been doctored as alleged, for the purposes of avoiding liability, this would inevitably affect the determination of the suit herein. The plaintiff is therefore entitled to the process of discovery in order to identify which partner of the first defendant was implicated in the alleged doctoring of the working files and papers. These are the questions that may only be answered by adducing evidence pursuant to the order for oral evidence.

Plaintiff's ex parte application to obtain the order for oral evidence is wrong

It was contended for the first defendant and two others that the plaintiff's application to obtain the order for oral evidence should not have been made ex parte but should instead invoke O 39 r 1 above.

The plaintiff's response is that the plaintiff's ex parte application above is perfectly within the procedure in *Norwich Pharmacal* principle which was approved by the Court of Appeal in *Lee Lim Huat*'s case.

In my judgment, since O 39 r 1 has not been relied upon by the plaintiff who has instead correctly followed and complied with the procedure as approved by the Court of Appeal in *Lee Lim Huat*'s case, O 39 has no application here.

Further, learned counsel for the first defendant and two others submitted to the effect that O 29 r 1(2) and (2A) of the Rules of the High Court 1980 should apply. In my view, O 29 has no application as it refers specifically to injunctions. The plaintiff's application was plainly and obviously for an order for oral evidence. In the circumstances, all the submissions advanced for the first defendant and two others are completely irrelevant to the order for oral evidence obtained pursuant to the *Norwich Pharmacal* principle.

Defects in the plaintiff's intitulement

Learned counsel for the first defendant complained that the plaintiff's intitulement in the application in encl 28 for order for oral evidence is defective and relied on *Cheow Chew Koon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457.

In response, it was submitted for the plaintiff that the case relied upon by the first defendant and two others related to an originating summons whereas the plaintiff's application was by way of a summons in chambers.

In my view, the submission for the first defendant and two others is devoid of merits. The authority relied upon concerns an originating summons and not a summons-in-chambers.

Further, the Supreme Court in *Sunkyong International Inc v Malaysia Rubber Development Corporation Bhd* [1992] 2 MLJ 146, inter alia, held that 'while it was far better to quote section and verse or specific order or rule in any application, it was never fatal to any application to omit to do so where the applicant can bring himself within any relevant specific order or rule'.

Conclusion

The application by the first defendant and two others in encl 62 cannot be sustained and is hereby dismissed with costs.

In line with the procedure and practice approved by the Court of Appeal in *Lee Lim Huat*'s case, the first defendant is given liberty to cross-examine the witnesses which are to be called by the plaintiff pursuant to the order for oral evidence.

Application dismissed with costs.

Reported by Loo Lai Mee